

No. 77-1399

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

MECHANIC'S BUILDING AND LOAN COMPANY,
PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not reported. The principal opinion of the district court (Pet. App. A3-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1978. The petition for a writ of

certiorari was filed on March 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether recommendations from the staff of the Federal Home Loan Bank Board regarding a pending branch bank application were privileged and properly protected from disclosure in discovery.

2. Whether the decision of the Board to approve the branch application challenged by petitioner was arbitrary or capricious.

STATEMENT

The Federal Home Loan Bank Board is responsible for, among other things, the organization, supervision and regulation of federal savings and loan associations. Its power over federal associations includes the authority to permit the establishment and operation of branch offices.¹

On September 27, 1974, Cardinal Federal Savings and Loan Association of Cleveland, Ohio (Cardinal Federal), filed an application to establish a branch office at the Richland Mall in Ontario, Ohio. Several other savings and loan associations, including petitioner, protested the application. After oral argument, at which all interested parties presented evi-

¹ This power is conferred by Section 5(a) of the Home Owners' Loan Act of 1933, 48 Stat. 132, 12 U.S.C. 1464(a).

dence, the Board approved Cardinal Federal's application (Pet. App. A19).

Petitioner then commenced an action in the United States District Court for the Southern District of Ohio for review of the Board's decision. Petitioner asked the Board to produce various documents prepared by its staff in connection with the branch application of Cardinal Federal. The documents at issue were: (1) an eight-page report prepared by the Board's Supervisory Agent in Cincinnati containing his analysis of the record and his recommendation whether the Board should approve or deny Cardinal Federal's branch application, and (2) a one-page report prepared by the Board's Office of Industry Development in Washington, D.C., containing the Washington staff's analysis of the application, its recommendation, and the draft of a proposed Board resolution. Although the Board declined to produce the documents themselves, it produced three pages of factual summaries prepared in connection with these reports, as well as all documents in the application file submitted by the applicant and the protestants.

The magistrate denied petitioner's motion to compel production. He reasoned that the documents were immune from discovery under executive privilege, because they involved predecisional deliberations within the Board (Pet. App. A15-A18). The magistrate also concluded that the opinions and recommendations in question were not relevant facts that the court had to consider in order to determine whether

the Board had acted arbitrarily or capriciously. The district court adopted the magistrate's decision without modification (*id.* at A13).

The district court then granted summary judgment against petitioner, ruling that the Board had not acted arbitrarily or capriciously in approving Cardinal Federal's branch application. The court also held that the Board was not required to issue findings of fact and conclusions of law or to support its decisions with an opinion (Pet. App. A4-A11).

The court of appeals affirmed (Pet. App. A1-A2). It held that the Board's approval of Cardinal Federal's branch application was "in no sense unreasonable, arbitrary, capricious or discriminatory" and that a rational basis existed for the Board's decision.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the district court failed to consider the entire administrative record, as required by the Administrative Procedure Act (5 U.S.C. ~~552~~⁵⁰⁶), because it did not order production of the staff advisory reports and recommendations submitted to the Board. It is settled, however, that a party may not inquire into the pre-decisional advice received by a decisionmaker. *United States v. Morgan*, 313 U.S. 409, 422; *Morgan v. United States*, 304 U.S. 1, 18. Pre-decisional advice by staff is well within the deliberative privilege, and, absent special circumstances, it therefore is not discoverable. *National Labor Relations Board v.*

Sears, Roebuck & Co., 421 U.S. 132; *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168.² See also *Fayetteville Savings & Loan Association v. Federal Home Loan Bank Board*, 570 F.2d 693 (C.A. 8); *National Courier Association v. Board of Governors*, 516 F.2d 1229, 1241-1243 (C.A. D.C.); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 604-605 (C.A. 5); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl.).

Petitioner maintains, however, that even if the recommendations are privileged, the claim should have been overridden here. Such contentions are addressed to the sound discretion of the district court, subject to reversal only for an abuse of discretion. *Baker v. F&F Investment*, 470 F.2d 778, 781 (C.A. 2), certiorari denied, 411 U.S. 966; *Swanner v. United States*, 406 F.2d 716 (C.A. 5). Such an abuse may not be found unless substantial prejudice to the rights of the parties has occurred. *Huff v. N. D. Cass Company of Alabama*, 468 F.2d 172, 176 (C.A. 5), modified on other grounds, 485 F.2d 710 (*en banc*); *Humble v. Mountain State Construction Co.*, 441 F.2d 816, 819 (C.A. 6).

² *Sears* and *Grumman* interpreted 5 U.S.C. 552(b)(5), which exempts from production under the Freedom of Information Act intra-agency memoranda that would not be normally available in discovery. The Court's conclusion that the documents were unavailable under the FOIA thus is equally applicable to discovery requests such as those at issue here.

There was no abuse of discretion here. The head of an agency, not its staff members, is accountable for its decisions; thus, even if the court had ordered disclosure of the staff reports here, petitioner could not have used them to attack the Board's ultimate decision. Moreover, departure from this doctrine would inhibit the full exchange of views within the agency and diminish the give-and-take essential to the decision-making process itself.

These principles cannot be avoided by casting the argument in terms of the completeness of the administrative record. The record on review of administrative action need not contain all documents that were before the agency when it made its decision but only those documents constituting the factual data from which the agency made its decision.³ All such factual

³ Petitioner observes (Pet. 13-14) that the Board twice has been required to produce internal staff reports in litigation. *Community Savings and Loan Association v. Federal Home Loan Bank Board*, 68 F.R.D. 378 (E.D. Wisc.); *City Federal Savings and Loan Association v. Federal Home Loan Bank Board*, 441 F. Supp. 89 (E.D. Wisc.), appeal pending, C.A. 7, No. 78-1038. While we believe those decisions to be incorrect, we note that the district court in *Community Savings* later rejected as unfounded a claim that petitioner advances here (Pet. 10)—that the Board does not review the entire administrative record but instead relies solely on its staff advice. *Community Savings and Loan Association v. Federal Home Loan Bank Board*, 443 F. Supp. 927, 933-935 (E.D. Wisc.). Petitioner offers no evidence to rebut the presumption of administrative regularity. See, e.g., *National Nutritional Foods Ass'n v. Food and Drug Administration*, 491 F.2d 1141, 1146 (C.A. 2), certiorari denied, 419 U.S. 874.

material was made available to the district court and to petitioner. There is no requirement that advisory opinions of staff members also be made part of the record on review. *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 69 (C.A.D.C.); *Pierce v. Securities and Exchange Commission*, 239 F.2d 160, 163 (C.A. 9); *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777, 790 (S.D. Tex.), affirmed *sub nom. Herrin Transportation Co. v. United States*, 366 U.S. 419.⁴

2. Petitioner also contends (Pet. 20-21) that the decision of the Board lacked a rational basis. The lower courts concluded otherwise, however, and there is no reason for this Court to review this essentially factual decision concurred in by two courts.

Petitioner concedes (Pet. 20) that the Board's decision concerning a branch application cannot be overturned so long as the reviewing court finds some rational basis in the record for the action taken. See *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1376 (C.A. 8), certiorari denied, 421 U.S. 930; *First National Bank of Fairbanks v. Camp*, 326 F. Supp. 541, 544 (D. D.C.), affirmed, 465 F.2d 586

⁴ There is no conflict between the decision in this case and either *First National Bank of Fairbanks v. Camp*, 465 F.2d 586 (C.A.D.C.), certiorari denied, 409 U.S. 1124, or *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371 (C.A. 8), certiorari denied, 421 U.S. 930. In the latter cases, the Comptroller of the Currency *voluntarily* made available copies of intra-agency memoranda in accordance with his general policy. Under the circumstances, the courts of appeals considered those memoranda along with the remainder of the administrative record.

(C.A.D.C.), certiorari denied, 409 U.S. 1124. This is consistent with the accepted principle that the decision of an administrative agency should be upheld unless it is arbitrary, capricious or an abuse of discretion. *Camp v. Pitts*, 411 U.S. 138, 142-143; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416.

In this case, the district court reviewed the "extensive record" (Pet. App. A5) and concluded both that the Board correctly applied its regulatory standards to Cardinal Federal's branch application and that the administrative record contained a rational basis for the Board's decision. The district court extensively analyzed the record evidence (Pet. App. A4-A11). The court of appeals agreed that the Board's decision "was in no sense unreasonable, arbitrary, capricious or discriminatory" (Pet. App. A1). No useful purpose would be served by further review.⁵

⁵ The Board need not issue findings of fact, conclusions of law, or an opinion explaining its branch application decisions. *Camp v. Pitts*, *supra*, 411 U.S. at 140-141. Petitioner thus derives no support from the absence of such an opinion here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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